UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JENNIFER and JESSICA GREENLEAF, two minors, by their father and next friend, RANDALL GREENLEAF	)	
Plaintiffs	)	
v.	)	Civil No. 98-250-B
RONALD COTE,	)	
Defendant	)	

Recommended Decision on Defendant's Motion for Summary Judgment

Plaintiffs, Jennifer and Jessica Greenleaf, appearing through their father and next friend, *pro se*, bring this action pursuant to 42 U.S.C. §1983 against Defendant, Ronald Cote, the principal of the middle school Plaintiffs attended last year. Plaintiffs allege that last year Defendant ordered the school staff to conduct several searches that violated their constitutional rights. Defendant maintains that he is entitled to summary judgment under the doctrine of qualified immunity and that the searches did not violate Plaintiffs' constitutional rights. After reviewing the record, the Court recommends that Defendant's Motion for Summary Judgment be GRANTED in part, and DENIED in part.

Procedural Issue

Previously the Court granted Randall Greenleaf's motion to add Jennifer and Jessica Greenleaf as Plaintiffs, by their father and next friend, Randall Greenleaf. For that reason they are now named as Plaintiffs in this matter. While Randall Greenleaf has standing to assert the constitutional rights of his daughters, he has made no claim that he has suffered any injury from Defendant's actions. Because Randall Greenleaf has not asserted any injury in his individual capacity, the Court recommends that Randall Greenleaf be DISMISSED as a named plaintiff in this suit.

Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)).

Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477

U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

Background

This suit stems from four separate searches conducted at the Carrie Ricker Middle School in Litchfield, Maine at Defendant's direction. Plaintiffs allege that these searches violated their constitutional rights, specifically under the Fourth Amendment to the Constitution.[1] During the time the searches took place, Jennifer Greenleaf was an eighth-grade student and her sister Jessica Greenleaf was a sixth-grade student.

A. The first search - morning of March 11, 1998

On the morning of March 11, 1998 Vice Principal Cathy McCue was approached by a student. The student told McCue that she had overheard another

[1] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons to be seized.

student's conversation in which the student stated that she and three other students had been drinking beer in the girls' locker room. McCue reported what the student said to Defendant. One of the four students alleged to have been drinking in the locker room was Jennifer Greenleaf. The four students, including Jennifer Greenleaf, were removed from their classes and searched individually.

Jennifer was searched in the hallway in the presence of McCue and Defendant. Once in the hallway, Jennifer was asked by McCue and Defendant to empty her pockets and to open her backpack. After emptying her pockets, she began to empty out her backpack. While emptying out her backpack, a denim bag the size of an index card fell out and Jennifer said "ummmm . . .ummmm". Defendant turned his back and stepped away from Jennifer. Jennifer then opened the bag and McCue examined its contents, which did not contain any alcohol. At some point during the search McCue motioned to Jennifer to shake out her bra.[2] Defendant and McCue found no alcohol on Jennifer or the other three students.

B. Locker clean-out - March 11, 1998

[2] McCue claims that it was Jennifer who mentioned shaking out her bra during the search. "When we [McCue and Defendant] told Jennifer to empty her bag and turn out her pockets, she asked if she was going to have to shake out her bra. I said "of course not." McCue affidavit at ¶ 11. As stated above, on a summary judgment motion the facts must be recited in a manner most favorable to the nonmovant, in this case Plaintiffs.

Still concerned about the reported incident, Defendant ordered a school-wide locker cleaning without any warning to the students or the teachers. Further, Defendant did not tell any of the teachers to look for anything specific. All the students, including Jennifer and Jessica Greenleaf, were ordered to go to their lockers and large wastebaskets were placed in the hallways. The students were told to clean out their lockers as teachers and school staff members observed the cleaning. Before closing their lockers, a school staff member looked at the locker to confirm that the locker had been cleaned. Backpacks, pant pockets and bags were not searched. No alcohol was found in any of the lockers.

C. The third search - morning of June 11, 1998

In early June Vice Principal McCue showed Defendant a film cannister that she found on a student that contained what she believed to be marijuana seeds. Earlier in the week evidence of marijuana use had been found in the boys' bathroom. Defendant sent the seeds to the local police department to identify whether the seeds were marijuana seeds. Later, Defendant spoke to a police officer who told him that the seeds were marijuana seeds and that the school had a drug problem. After this conversation Defendant decided to conduct a search of all the students and notified school staff members of the upcoming search.

On June 11, 1998 the eight graders, including Jennifer Greenleaf, were in the gym rehearsing their graduation ceremony when Defendant entered the gym and told all the students to go to their lockers and stand there with their bags. Each locker was searched individually. Each student was asked to open their backpack and any closed containers in their locker and to fan through the pages of their books. Mr. Dunn, a teacher at the school, conducted the search of Jennifer's locker and belongings.

D. The fourth search - afternoon of June 11, 1998

That afternoon a similar search was conducted with the sixth and seventh graders. Charlena Beganny, Jessica's teacher searched Jessica's locker and belongings. Beganny had been told to conduct a search but was not told by anyone what she should specifically look for. Beganny searched Jessica's backpack and her locker. Beganny never searched Jessica's pockets.

Analysis

I. Qualified Immunity.

Defendant argues that he is entitled to qualified immunity, which shields government officers "'from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). The inquiry regarding qualified

immunity "takes place prior to trial, on motion for summary judgment . . . and requires no fact finding, only a ruling of law strictly for resolution by the court." *Id*. at 1373-74.

The qualified immunity inquiry has two prongs. First, we must determine whether the right asserted by Plaintiffs was clearly established at the time of the contested events. *Id*. at 1373. Second, the Court must determine whether viewing facts in a light most favorable to plaintiff, "an *objectively* reasonable officer, similarly situated, *could have believed* that the challenged . . . conduct did *not* violate" that clearly established right. *Hegarty*, 53 F.3d at 1373. (emphasis in original).

A. Search of Jennifer Greenleaf - morning of March 11, 1998

The Fourth Amendment to the U.S. Constitution protects students against unreasonable searches. *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). This protection extends to "a search of a child's person or of a closed purse or other bag carried on her person. . . ." *Id.* at 337. In *T.L.O.*, the Court stated that the reasonableness of the search when based on individualized suspicion is determined through a two-step analysis. First, the Court must determine whether the search was "justified at its inception." *Id.* at 341. Second, the Court must analyze "whether the search as actually conducted 'was reasonably related in scope to the circumstances

which justified the inference in the first place.'" *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

Many lower courts have applied the standard in *T.L.O.* and the most recent opinions have stated that the standard set forth in *T.L.O.* is clearly established. *See, Konop v. Northwestern Sch. Dist.*, 26 F.Supp. 2d 1189, 1196, (D. S.D. 1998) (Since *T.L.O.* was announced, fact that school officials may not unreasonably search a student or the student's belongings is clearly established.); *Sostarecz v. Misko*, No. CIV.A.97-CV-2112, 1999 WL 239401, at *4-5 (E.D. Pa. March 26, 1999) (*"T.L.O.'s* point is clear that school officials are not permitted to unreasonably search a student's person or her belongings.") The Court agrees with the authority cited above and is satisfied that Jennifer had a clearly established right to be free from an unreasonable search of her belongings by Defendant.[3]

The Court must then move on to the second prong and determine whether an objectively reasonable principal, similarly situated, could have believed that the search was reasonable. As stated above, to determine whether the search was

[3] Defendant cites *Jenkins v. Talladega City Bd. Of Ed.*, 115 F.3d 821 (11th Cir. 1997) as support for the proposition that the law regarding student searches is not clearly established. In *Jenkins*, the Court held that the Defendant was entitled to qualified immunity because the standards of reasonableness adopted in *T.L.O.* are not sufficiently detailed to enable a school official to use as a measure of constitutional conduct. *Id.* at 825. The Court disagrees with the holding in *Tallageda*. *See Sostarecz v. Misko*, 1999 WL 239401 at *4-5 (E.D. Pa. 1999) (disagreeing with the holding in *Jenkins*); *Konop v. Northwestern School Dist.*, 26 F. Supp. 2d 1189, 1195-96 (D. S.D. 1998) (disagreeing with the holding in *Jenkins*).

reasonable we examine whether it was justified at its inception and reasonable in scope. *T.L.O.*, 469 U.S. at 341. A search is justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 342.

Here, Defendant conducted the search based on a discussion with Vice Principal McCue. McCue told Defendant that she was told by a student that this student overheard another student say that she had been drinking beer in the girls' locker room with three others. Based on this third hand information, and apparently without questioning either the student who made the statement or the student who reported the statement to McCue, Defendant conducted the search of Jennifer.[4] Further, Jennifer apparently was not questioned about the alleged incident until after the search was completed. This search occurred even though there is no indication that Jennifer ever had any history of drinking alcohol at the school or, for that matter,

[4] In *Williams v. Ellington*, 936 F.2d 881, 888-89 (6th Cir. 1991) the Court analogized information of unlawful activity brought forward by a student to an informant's tip. The Court stated that while "some tips, though unverifiable, are reliable. [Defendant] carefully questioned [the informant] about any improper motive for making the allegations, and was satisfied that none existed." *Id.* As stated above, the record is absent any facts that show that Defendant questioned the student who brought forward the allegation that she overheard another student say she and three others were drinking beer in the girls' locker room.

any disciplinary problems.[5] Based on the apparently scant information under which Defendant conducted the search, and taking all possible inferences in Plaintiffs' favor, the Court is satisfied an objectively reasonable principal, similarly situated, could not have believed that the search was justified at its inception. *See T.L.O.*, 469 U.S. at 325 (teacher personally discovered T.L.O. smoking in the bathroom); *Sosatercz*, 1998 WL 239401, at *4, 7 (search conducted after student's inappropriate behavior in class); *Singleton v. Board of Education*, 894 F. Supp. 386 (D. Kan. 1995) (principal had a reasonable ground to search a student when an adult woman visiting the school accused student of stealing $150 from the front seat of her car); *Williams v. Ellington*, 936 F.2d 881, 887-89 (6th Cir. 1991) (search was reasonable after another student approached defendant about plaintiffs' use of drugs and one of the plaintiffs' parents told defendant that his daughter had recently stolen money from him and that he was concerned that his daughter had a drug problem.) For the reasons stated above, the Court recommends that Defendant not be granted qualified immunity as to the search conducted on Jennifer Greenleaf on March 11, 1998.[6]

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[5] The Court is aware that later, during discovery in this case, Jennifer admitted to drinking beer the morning of the search. However, this fact has no bearing on whether Defendant had reasonable grounds to search Jennifer *at the time of the search*.

[6] The Court notes that even if the search was justified at its inception, a question remains over whether the search was reasonable in scope. For a search to be reasonable in scope it must be reasonably related to the objectives of the search. *T.L.O.*, 469 U.S. at 341. One particular fact in this matter related to the scope of the search is whether Jennifer was asked or whether she offered to

Having determined that Defendant is not entitled to qualified immunity the Court turns to whether he is entitled to summary judgment on the merits. Defendant does not present any additional facts on the merits. Accordingly, the Court concludes that material questions of fact exist as to whether the search was justified at the inception and reasonable in scope. For the reasons stated above, I recommend that Defendant's Motion for Summary Judgment regarding the search of Jennifer Greenleaf on March 11, 1998 be DENIED.

B. Locker clean-out - March 11, 1998

Plaintiffs argue that the school-wide locker clean-out conducted by Defendant also constituted an unreasonable search and seizure. Under the qualified immunity analysis, this Court must determine whether Plaintiffs had a clearly established expectation of privacy in their lockers. In *T.L.O.* the Court specifically stated "We do not address the question, not presented by this case, whether a school child has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies." 469 U.S. at 337. *See, Hedges v. Musco*, 33 F.Supp.2d 369, 377 (D. N.J. 1999) ("The Supreme Court has not addressed whether a pupil has a legitimate expectation of privacy in her locker nor has the Court

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shake out her bra during the search for beer. Assuming for the purposes of this motion that she was asked to shake out her bra, the Court is satisfied that a reasonable officer, similar situated, could not have believed that searching her bra for beer could have been reasonable in scope.

expressed any opinion on the standards governing school officials' searches of student lockers." (citation omitted.)) Likewise, the First Circuit has not spoken to the question of whether a locker clean-out violates a student's expectation of privacy thereby raising Fourth Amendment implications. Because the expectation of privacy in a school locker is not "clearly established" the Court recommends that Defendant be granted qualified immunity on this claim.

C. Searches three and four - June 11, 1998

Plaintiffs also claim that the school-wide search of every students' locker, backpacks, pockets, and closed containers in the lockers constituted an unreasonable search. At stated above, the Fourth Amendment to the U.S. Constitution protects students against unreasonable searches. *T.L.O.*, 469 U.S. at 334. However, the Court in *T.L.O.* did not address whether individualized suspicion is an essential element of the reasonableness of the search. *T.L.O.*, at 342, n.8. In fact, when individualized suspicion is not a basis for the search *T.L.O.* is inapplicable. See, *DeRoches v. Caprio*, 156 F.3d 571, 575 (4th Cir. 1998) Instead, to determine the reasonableness of a search not based on individualized suspicion, the Court applies the standard of reasonableness laid down ten years later in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

In *Vernonia*, the Court held that the school district's requirement that all student-athletes take random drug tests was reasonable and therefore constitutional. The Court found that the testing was reasonable after balancing the students' privacy interests against the government interests in conducting the search. *Id.* at 661. The factors laid down by the Court when determining the reasonableness of the search are:

> 1. The privacy interest intruded upon;
>
> 2. The nature and immediacy of the governmental concern at issue;
>
> 3. The character of the intrusion and the efficacy of the means employed in meeting the concern.

Brousseau v. Town of Westerly, 11 F. Supp. 2d 177, 181 (D. R.I. 1998) (citing *Vernonia*, 515 U.S. 654-660.)

Here, it is clear that Plaintiffs have an expectation of privacy in their backpacks, pockets and closed containers. *T.L.O.*, 469 U.S. at 325. However, the Court is also satisfied that the nature and immediacy of the governmental concern at issue is apparent. Preventing the proliferation of drugs in the schools is a substantial government interest. *See Vernonia,* 515 U.S. at 661 ("Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs. . . .") Defendant was confronted with three pieces of information that led him to conclude a drug problem

existed at his school: a teacher reported smelling marijuana smoke in a bathroom, a student was found carrying marijuana seeds and a police officer reported to Defendant that the school had a drug problem. Defendant ordered that the search be conducted only after he was told by the police officer that the school had a drug problem.

Lastly, the Court is satisfied that a reasonable official in Defendant's position would conclude that the search was not overly intrusive and was an effective way to meeting the concern regarding drug abuse. Each student was asked to empty their backpack, pockets and closed containers, places where drugs may be hidden. This limited search of the students' belongings was not so intrusive as to be deemed unreasonable especially in light of the government's substantial interest in preventing drug abuse among school children. The method employed to determine whether any students possessed drugs was likewise effective and reasonable. For the reasons stated above, the Court is satisfied that Defendant is entitled to qualified immunity as to the searches conducted on June 11, 1998. Accordingly, I recommend that Defendant's Motion for Summary Judgment be GRANTED as to the searches conducted on June 11, 1998.

Conclusion

The Court recommends that Defendant's Motion for Summary Judgment be GRANTED as to the locker clean-out conducted on March 11, 1998, and the searches conducted on June 11, 1998, and be DENIED as to the search conducted on Plaintiff Jennifer Greenleaf on the morning of March 11, 1998. Further, the Court recommends that Randall Greenleaf be DISMISSED as a named Plaintiff in this suit.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu
United States Magistrate Judge

Dated on March 3, 2000.